Supreme Court, U.S.
FILED
FEB 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

(5)

NO. 85-937

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF WEST VIRGINIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

# REPLY OF THE STATE OF WEST VIRGINIA TO THE UNITED STATES BRIEF IN OPPOSITION

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After West Virginia filed its Petition for Certiorari, the Third Circuit issued a decision inconsistent with the Fourth Circuit decision currently before this Court. Accordingly, this reply is filed. Because the federal government raised points not

previously addressed, this reply will deal with those arguments as well.

1. IN ADDITION TO BEING INCONSISTENT WITH THE SECOND CIRCUIT IN PERALES v. UNITED STATES, THE FOURTH CIRCUIT OPINION BELOW IS NOW INCONSISTENT WITH THE THIRD CIRCUIT DECISION IN COMMONWEALTH OF PENNSYLVANIA v. UNITED STATES.

On January 6, 1986, the Third Circuit Court of Appeals decided Commonwealth of Pennsylvania v. United States, ___ F.2d ___ (No. 85-5186) (hereafter Pennsylvania), which, like the Second Circuit in Perales v. United States, 751 F.2d 95 (1984), conflicts with the Fourth Circuit holding currently before this court. In Pennsylvania, the Third Circuit joined the Second Circuit in holding "that absent express statutory authorization federal agencies may not impose interest charges on debts owed by

states." The Third Circuit, like the Second Circuit, premised its holding on two independent grounds:

> "In affirming the district court's decision on the interest issue, the Second Circuit relied on the district court's reasoning. 751 F.2d at 96. The district court had denied state liability for interest pursuant not only to the Debt Collection Act, but also to the Pennhurst holding recited earlier, insisting that statutory impositions of requirements for state participation in federal programs be explicit. 598 F. Supp. at 24-26. Arguably this latter reasoning provides additional support for the result reached today. * * *" Pennsylvania, n.13.

While it is true that the Debt Collection Act, 31 U.S.C.A. § 3701, does not apply to contracts entered prior to October, 1982, it does however represent an additional indicia of the national policy of not awarding prejudgment

interest against states. The inconsistencies and conflicts between the Second and Third Circuits and the Fourth Circuit occur not only on the Pennhurst (I) issue, but also on the interpretation of federal common law as it relates to prejudgment interest in intergovernmental litigation.

### A. The Conflict on the Significance of Statutory Silence

Pennhurst (I) holds that where "Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously * * * . By insisting that Congress speak with a clear voice we enable the states to exercise their choice knowingly, cognizant of the consequences of their participation." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981).

Perales and Pennsylvania contrast specific statutory provisions granting prejudgment interest [Medicaid, 42 U.S.C. § 1396b(d)(5) and Social Security, 41 U.S.C.§ 318(j); Perales at 24, Pennsylvania n.12] with the fact that the statute before them was silent on the issue. Thus they held that under Pennhurst (I), the failure of Congress to speak with the "clear voice" (silence is not a "clear voice") precludes an award of prejudgment interest. Like the cases before the Second and Third Circuits, the statute involved below makes no mention of prejudgment interest. This lack of specific authorization, or silence, was pointed out by West Virginia (App. Pet. C 14-15). Unlike the Second and Third Circuits, the Fourth Circuit granted interest in

the face of statutory silence. Thus a conflict.[1]

B. The Interpretation of Federal Common Law Differs Between the Second, Third and Fourth Circuits.

The second area of conflict between the circuits arises with the interpretation of federal common law as it relates to awarding prejudgment interest in intergovernmental litigation. In fact all three circuits interpret the federal common law differently. Perales plain and simple holds there is no common law right: "The cases in no way suggest that the United States is entitled to

[1] Both the Fourth Circuit and the federal government argue that the language in the Federal Disaster Relief Act, which has been interpreted to mean "that the preferable course of conduct

collect interest from a state agency on claims governed by a statute that does not authorize it to do so." Perales at 25. The Fourth Circuit, reviewing and citing the same cases as the Second Circuit [Royal Indemnity Co. v. United States, 313 U.S. 289 (1941), etc.], holds that interest is allowable under the federal common law as a "matter of right." (App. Pet. D. 10-13) In the Third Circuit the federal government relied upon United States v. West

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involves provision of the site by someone other than the federal government" (United States v. West Virginia, 537 F. Supp. at 396 (App. Pet. A-38)], is sufficient to impose prejudgment interest. The State of West Virginia disagrees. The statute in no way addresses prejudgment interest, and is indistinguishable from the similar statutory silence encountered by the Second and Third Circuits.

Virginia, the current case. In analyzing the claim of the federal government, the Third Circuit, noting Board of County Commissioners v. United States, 308 U.S. 343 (1939), indicates that in certain instances interest is awardable against a sovereign. "Relevant considerations are the congressional purpose behind the statute and the relative equities."[2] Three circuits reviewed the federal common law, and

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[2] In continuing its analysis the Third Circuit addresses the national interest involved and held that the Debt Collection Act abrogates the common law and thereby forbids the award of interest. In our current case, the district court followed a Third Circuit type of analysis, considered the national interest (the purpose of the Disaster Relief Act) (App. Pet. C 19-21) and appropriately declined to award interest. The Fourth Circuit failed to make such an analysis, ignored the purpose of the Disaster Relief Act, and awarded interest in their alternative holding.

three conflicting interpretations resulted. In the Second Circuit the common law does not allow an award; in the Fourth Circuit the award is allowed as a matter of right; and in the Third Circuit its a discretionary call involving a balancing. Three circuits, three interpretations, i.e., never, always and sometimes, a conflict deserving review.

## 2. JURISDICTIONAL ISSUES MAY BE RAISED AT ANY TIME DURING LITIGATION.

The Tenth Amendment represents a constitutional limitation upon the federal judicial power, and thus may be raised at any point in a proceeding. Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89, n.8 (1984); Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 467 (1945); See also, Rule 12(h)(5) Federal Rules of Civil Procedure.

The issue involved is whether a state may be held liable for the ultra vires acts of its officers and if so whether such holding would thereby violate the Tenth Amendment. The Tenth Amendment argument is a new wrinkle to the ultra vires issue and was raised before the Fourth Circuit by way of petition for en banc rehearing. The state, quite frankly, was surprised by the Fourth Circuit's failure to follow well-established precedent. It is settled both in West Virginia and as a matter of federal law that a government may not be held liable for unauthorized acts of its officers. Heckler v. Community Health Services, 467 U.S. 51 (1984); W. Va. Public Emp. Ins. v. Blue Cross Hosp. Services, ___ W. Va. ___, 328 S.E.2d 356 (1985). The insistence of the lower courts to disregard this

precedent, coupled with the federal argument that "federal" common law vitiates any state law limitations, necessitated pointing out the protection these particular state law limitations are due pursuant to the Tenth Amendment of the United States Constitution.

### 3. IGNORING STATE CONSTITUTIONAL LIMITATIONS UPON STATE GOVERNMENT DOES NOT EQUATE WITH A RATIONAL CONSTRUCTION OF STATE LAW.

The federal government argues that: "There is no reason for this Court to grant certiorari to reconsider a construction of state law in which both lower courts concurred." Untrue.

The issues before this Court involve the failure of the lower courts to give adequate respect to state sovereignty. The issue of state law purportedly "resolved" by the lower

courts were not collateral issues or mere predicates to the determination of a federal question. Rather, the lower court's treatment of state law is the critical error complained of. In a case where federal courts have allegedly violated fundamental principles of federalism and comity by ignoring or abusing a state's constitution, this court should engage in a searching de novo legal analysis like that conducted in Ford Motor Co. supra. The failure of the lower courts to do this type of analysis, or to even address critical state constitutional limitations is the reason the State of West Virginia seeks relief here today. Concurrence in ignoring controlling provisions of state law is, of itself, deserving of review.

## 4. THE FACTUAL PRESENTATION MADE BY THE FEDERAL GOVERNMENT IS UNREASONABLY SKEWED.

Even though the advisory jury found unanimously on behalf of West Virginia, the special judge appointed to hear the case saw fit to ignore their findings and enter his own. Under applicable law it is the judge who is entitled to deference, not the jury. Because of that the state relies on legal arguments, and accordingly the facts of the underlying dispute become irrelevant to the disposition of the case. The state feels compelled, however, to rebut some of the federal government's factual representations.

The underlying dispute is over who was to perform site preparation. West Virginia Governor Arch A. Moore, Jr., testified to his understanding at trial:

> "The responsibility of the State as I understand it to be was that the State would use its good offices to obtain the land either by purchase or lease and make it available to the federal people to situate the emergency housing on those sites." (JA 1086)

A television news conference shortly after the disaster corroborates Governor Moore's testimony. In attendance, among others, were the Director and Regional Director of the United States Office of Emergency Preparedness, Charles Lieberth, Director of the HUD Regional Office, Major General William L. Starnes, United States Army Corps of Engineers, and Governor Moore. During that conference Governor Moore stated publicly:

> "May I say to you that, again, the Department of Housing and Urban Development here is providing mobile homes for us, the sites, as Charles indicated, are provided by the State of West Virginia. And the Corp of Engineers bring

> all of the services to the site. The State has the responsibility of providing the site." (JA 643)

The understanding of the Governor in 1972 and at trial was that the state would provide the sites and that site preparation was the responsibility of the Corps of Engineers. This understanding is consistent with the statements made by the federal officials at that same news conference. The HUD official stated that "site acquisition" was the responsibility of the state. (JA 629) General Starnes stated that the Corps had "two major areas," "debris clearance" and "site preparation for trailers." (JA 634) General Starnes' statements were entirely consistent with Governor Moore's belief that the Corps was responsible for site preparation. (JA 634-635) The jury verdict for the

state amply demonstrates that the facts are not as clear as the federal government now asserts.

## CONCLUSION

Three circuits have recently addressed the issue of prejudgment interest in intergovernmental litigation and a conflict exists. The conflicts are on two fronts. On the issue of what federal common law provides as to awarding prejudgment interest, there are now three different answers, always in the Fourth Circuit, never in the Second Circuit and sometimes in the Third Circuit. As to whether prejudgment interest should be awarded in the face of statutory silence, the Second and Third Circuits say no, the Fourth Circuit says yes. These inconsistencies should be addressed by this Court.

These are not the only issues presented by the instant case. Important issues of comity, federalism and choice of law are implicated in the decisions below, not the least of which is whether general agency and commercial litigation cases may be properly applied to litigation where a state is a party. The federal government urged and the lower courts concurred that West Virginia's status as a state is "irrelevant." This issue alone is of sufficient importance to justify review.

Accordingly, the State of West Virginia asks this Court to grant certiorari.

Respectfully submitted,

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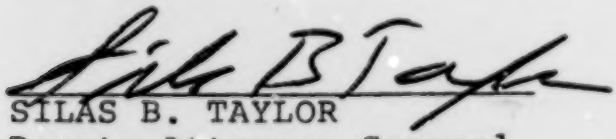

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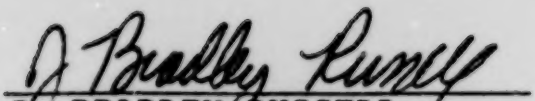

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